

REMARKS

Claims 1-24, 33 and 34 were pending. Applicants have herein amended claims 1 and 33, and cancelled claims 7-8, 11-12, and 23-24. Support for the amendments can be found in the Specification and the original claims. No new matter has been added. Accordingly, claims 1-6, 9-10, 13-22, 33 and 34 are pending.

Applicants thank the Examiner for the reconsideration of the finality of the previous Office Action and the withdrawal of the same.

In light of the amendments and remarks herein, Applicants respectfully request reconsideration and allowance of the pending claims.

Rejections under 35 U.S.C. § 102(b)

The Examiner rejected claims 1 and 23 as anticipated by the Restaurant Wine reference as evidenced by the Clear Creek Distillery reference. In particular, the Examiner stated that grappa moscato is made from the pressed skins and seeds of the Muscat grapes, and alleged that such a liqueur read on the instant claim limitations of a composition comprising a grape skin extract and a Muscat grape seed extract.

Applicants respectfully disagree, particularly with respect to the claims as currently amended. Applicants first note that one having ordinary skill in the art would not consider a grappa liqueur to be a "dietary supplement," as recited in the present claims. Moreover, the Restaurant Wine reference does not disclose a dietary supplement *in pill or powder form*, let alone a dietary supplement comprising a grape skin extract and a Muscat variety grape seed extract, wherein the Muscat variety grape seed extract is *unfermented* (not the case with a liqueur), and further wherein the Muscat variety grape seed extract comprises at least about 70 percent polyphenolics, at least about 3.5 percent monomeric flavanols, at least about 60 percent oligomeric flavanols, and less than about 35 percent polymeric flavanols. Accordingly, as the Restaurant Wine reference in view of the Clear Creek Distillery reference does not disclose each and every element of the claims, it cannot anticipate the claims. Withdrawal of the rejections is respectfully requested.

Rejections under 35 U.S.C. § 103

Claims 1-24, 33 and 34 remain rejected under 35 U.S.C. § 103(a) as being unpatentable over Perkes (WO 99/07400) ("Perkes") in view of Shrikhande *et al.* (U.S. Pat. No. 6,544,581) ("Shrikhande"). The Examiner maintained the prior rejections over Perkes in view of Shrikhande, stating that the Declaration previously provided by the Applicants did not demonstrate a discernible difference between the prior art compositions and those instantly claimed, and further alleging that the comparability of the extracts was unclear as to the amounts of active ingredients.

The Supreme Court recently clarified that for an invention to be obvious under § 103 requires consideration of the factors set forth in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966), including an analysis of the scope and content of the prior art and the differences between the claimed subject matter and the prior art. *See KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. ____ (2007), 2007 WL 1237837 (hereinafter "KSR"). In applying *KSR*, the Office stated that Perkes disclosed compositions similar to the ones presently claimed, but did not explicitly mention the use of Muscat grape seed extracts. To fill this difference in content between the prior art and the present claims, the Office stated that Shrikhande disclosed the use of Muscat grape seeds in the preparation of a nutritional composition, a disclosure which the Office alleged that one having ordinary skill in the art would view as useful guidance in the choice of a grape seed extract for use in the Perkes compositions.

Applicants respectfully disagree, particularly with respect to the claims as currently amended. Applicants note that the present claims not only recite a particular variety of grape seed extract (Muscat), but further recite particular amounts of active ingredients of the Muscat grape seed extract, including at least about 70 percent polyphenolics, at least about 3.5 percent monomeric flavanols, at least about 60 percent oligomeric flavanols, and less than about 35 percent polymeric flavanols. Neither Perkes nor Shrikhande disclose or suggest such amounts of active ingredients, nor provide a rationale for one having ordinary skill in the art to modify the compositions of either Perkes or Shrikhande to result in the presently claimed dietary

supplements having these particular amounts of active ingredients. Accordingly, Applicants assert that the Examiner has not established a *prima facie* case of obviousness for the amended claims given the two references, and thus that the claims are not obvious.

With respect to the prior Declaration results, Applicants note that the Examiner objected to the fact that Formulation A seemingly demonstrated the same inhibition results for all seed extracts at the higher 760 mg/L dosage, alleging that this fact demonstrated that there was no discernible difference between the prior art compositions and the instantly claimed invention at these higher dosages. Applicants respectfully disagree. The fact that the present formulations and the prior art formulations had similar results at certain higher dosages does not in any way negate or rebut the fact that the present compositions *did, in fact, demonstrate* surprising results at the lower dosages. It is self-evident, and one having ordinary skill in the art would so recognize, that a higher efficacy at a lower dosage is clearly surprising and preferred to use of a higher dosage of a given composition. Accordingly, Applicants respectfully assert that the claims are not obvious given the art cited, and respectfully request withdrawal of the rejections.


CONCLUSION

Applicants respectfully assert that all claims are in condition for allowance, which action is hereby requested. The Examiner is invited to telephone the undersigned attorney if such would expedite prosecution.

Please apply \$1050 for the Petition for Extension of Time fee (3 months) and any other charges or credits to deposit account 06-1050.

Respectfully submitted,

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Teresa A. Lavoie
Reg. No. 42,782

Fish & Richardson P.C.
60 South Sixth Street
Suite 3300
Minneapolis, MN 55402
Telephone: (612) 335-5070
Facsimile: (612) 288-9696